IN THE

Supreme Court of the United States

FILE
DEC 3
MICHAEL

OCTOBER TERM 1979
NO. 79-850

TWIN HARBORS STEVEDORING CO.,
Petitioner,

v.

JAMES D. BACHTEL, DONNA BACHTEL,
and MAMMOTH BULK CARRIERS, LTD.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

WILLIAMS, LANZA, KASTNER &
GIBBS
Paul C. Gibbs
Joel D. Cunningham
Attorneys for Petitioner

Office & P.O. Address:
1440 Washington Building
P.O. Box 21926
Seattle, Washington 98111
Telephone: (206) 628-6600

ABCO AT CRAFTSMAN PRESS SEATTLE

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TWIN HARBORS STEVENDORING CO.,
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PETITION FOR WRIT OF CERTIORARI
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Petitioner-intervenor prays that Writ of Certiorari issue to review the judgment of the United States Court of Apeals for the Ninth Circuit in Case No. 77-3043 (its companion case is 77-3645) entered on August 20, 1979, and the denial of petitioners motion for Rehearing, dated October 15, 1979.

OPINIONS BELOW

The unpublished opinion of the United States District Court for the Western District of Washington is set forth in the Appendix, pages A-1 through

A-2. The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported but is set forth in the Appendix, B-1 through B-20. The denial of Petitioners' Motion for Rehearing is contained in Appendix C.

JURISDICTION

On August 20, 1979, the court of appeals entered its judgment reversing the judgment of the district court regarding assessment of pro rata attorney's fees against the compensation lien. The jurisdiction of ths Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are:

1. Whether the compensation carrier's lien for medical expenses, wage loss, and disability paid to the injured longshoreman pursuant to the Longshoremen's and Harbor Workers' Compensation Act[1] should be reduced by pro rata attorney's fees to be paid to the plaintiff-longshoreman's

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[1] 33 U.S.C. § 901, et seq.

attorney where the longshoreman has recovered a judgment against a third party substantially in excess of the carrier's lien?

2. Whether, if the compensation lien is to be assessed pro rata attorney's fees, the fees to be paid to the plaintiff-longshoreman's attorney should be reduced by the fees the compensation carrier has paid its own attorneys, where the carrier has intervened early in the lawsuit to protect its lien?

STATUTES AND REGULATIONS INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 933:

> Compensation for injuries where third persons are liable
>
> Election of remedies
>
> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

Acceptance of compensation operating as assignment

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Payment into section 944 fund operating as assignment

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

Institution of proceedings or compromise by assignee

(d) Such employer on account of such assignment may either institute preceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

Recoveries by assignee

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to--

(A) the expenses incured by him in respect to such proceedings or compromise (including a reasonable

attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

Institution of proceedings by person entitled to compensation

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the empoyer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against third person.

Compromise obtained by person entitled to compensation

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative should be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

Subrogation

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Right to compensation as exclusive remedy

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representative if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 933 was enacted in 1927, and has been amended in 1938, 1959, and 1972. The

complete legislative history as set forth in 33 U.S.C.A. § 933 is reproduced in Appendix D.

STATEMENT OF THE CASE

On May 14, 1975, longshoreman James D. Bachtel entered into a fee agreement with his attorneys, the firm of Levinson, Friedman, Vhugen, Duggan, & Bland and agreed to pay them a sum equal to 33-1/3 percent of all sums recovered, whether as a result of an out-of-court- settlement or as a result of trial for an action to be brought against the shipowner. James Bachtel brought an action against the shipowner pursuant to 33 U.S.C. § 933(b) on June 24, 1975. On August 29, 1975, the parties entered into a stipulation and order granting the compensation carrier the right to intervene in the action to protect its lien. (Tr. 90) At that time, the longshoreman and the compensation carrier agreed to share the costs of litigating the third party action except for attorney's fees--each party was to underwrite his own attorney's fees--but the order preserved their respective claims as to the lien, and attorney's

fees, if any, to be assessed against the lien, until after a verdict was entered. (Tr. 90)

A contingent fee of 33-1/3 percent is the customary fee arrangement in third party actions brought by longshoremen in the Western District of Washington. (Tr. 90)[2]

The case was tried and the jury awarded a net recovery to plaintiff against the shipowner of $266,331.75.

Based on these facts, the District Court Judge, Judge McGovern, applied the statutory "Fund Rule" first announced in Fontana v. Pennsylvania R.R., 106 F. Supp. 461 (S.D.N.Y. 1952) aff'd sub nom. Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir. 1953), cert denied, 346 U.S. 886, 74 S. Ct. 137, 98 L. Ed. 390 (1953). Judge McGovern noted that the Fund Rule, patterned after the statutory formula set forth in 33 U.S.C. § 933(e), as adopted in

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[2] However, the longshoreman's attorney has admitted that it has been the practice of lawyers in the Western District to take 33-1/3 percent of the longshoreman's net recovery, that is, his recovery after the lien has been paid back. (Respondent Bachtel's Answer to Petition for Rehearing, pp. 2, 3 and 4)

Fontana, supra, had been applied in the First Circuit in Cella v. Partenreederei M/S Ravenna, 529 F.2d 15 (1st Cir. 1975), cert denied, 425 U.S. 975, 96 S. Ct. 2175, 48 L. Ed. 2d 799 (1976) and the Second Circuit in Valentino v. Rickners Rhederei, G.M.B.H., SS Etha, 552 F.2d 466 (2d Cir. 1977). Judge McGovern declined to follow the "Pro Rata Rule" adopted in the Fourth Circuit in Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975).

The Ninth Circuit Court of Appeals reversed, and directed Judge McGovern to apply the pro rata formula adopted in Swift v. Bolten, supra. The Ninth Circuit rejected the Fund Rule for the following reason: "The 'Fund' approach, in our view, places an unconscionable burden upon the injured person." (App. B-17)

Under the Fund Rule, the recovery by the plaintiff-longshoreman is disbursed as follows: costs and attorney's fees are paid first, then the compensation lien is paid back in full, and the remainder is paid to the longshoreman. As applied to the facts of this case, assuming the plaintiff's attorney's one-third contingency fee comes from the

gross[3] recovery, the Fund Rule would result in disbursing the $266,331.75 Judgment as follows: (1) $88,777.25 to the plaintiff's attorney; (2) $32,561.51 to the compensation carrier; (3) 144,992.99 to the longshoreman.[4]

The Pro Rata Rule adopted by the Ninth Circuit, forces the compensation carrier to pay the plainfiff-longshoremen's attorney a pro rata attorney's fee out of the lien pursuant to whatever contingency fee agreement has been entered into between the plaintiff and his attorney. As applied to the facts of this case, the reimbursement of the carrier for its medical and disability payments is reduced by one-third or $10,853.84. Thus, under the Pro Rata Rule, the $266,331.75 net recovery

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[3] This assumes the contingency fee was based on a gross recovery. If the contingency fee is based on the longshoreman's net recovery, the allocation would be as follows: (a) $77,923.41 to the plaintiff's attorney; (2) 32,561.51 to the carrier; and (3) $155,846.83 to the longshoreman. In other words, the plaintiff's recovery would be the same as it would be under the Pro Rata Rule. See text above and see footnote 2, supra.

[4] Assuming "0" costs for simplicity.

would be disbursed as follows: (1) $88,777.25 to the plaintiff's attorney; (2) $21,707.67 to the compensation carrier; and (3) 155,846.83 to the longshoreman.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because:

1. A conflict exists among the courts of appeal as to how the compensation carrier's lien should be assessed attorney's fees; the First and Second Circuits have adopted the "Fund Rule;" the Fourth and Ninth Circuits, the "Pro Rata Rule;" and the Fifth Circuit a "Quantum Meruit Rule", which would basically leave the question of attorney's fees up to the discretion of the district court judge.

2. The Ninth Circuit Court of Appeals has decided an important question of federal law which has not, but should be, settled by this Court.

BACKGROUND OF THE QUESTION

Congress, in 33 U.S.C. § 933(e), enacted the Fund Rule for third party actions brought by employers. For unknown reasons, Congress did not make any provision for awarding attorney's fees if the third party action was brought by the employee, and not the employer. In 1952, the District Court for the Southern District of New York held that the statutory Fund Rule applied to employer actions should also be applied in employee actions in determining whether a compensation lien should be charged with payment of attorney's fees. It stated in Fontana v. Pennsylvania R.R., 106 F. Supp. at 464:

> There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently. The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself. As such it is immaterial whether the fund was created in a suit brought by the employer or one brought by the employee.

The Fontana case was decided before Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1955). This is important because the legal setting before

Ryan is similar to the one existing after the 1972 Amendments, one where the shipowner could not seek Ryan-type indemnity or contribution from the stevedore employer. Cases decided after Ryan, and before the amendments, between 1956 and 1972, are not persuasive authorities for cases arising after the 1972 Amendments because during that period of time the interests of the compensation carrier and the plaintiff-longshoreman were always adverse. Today, the interests of the longshoremen and the compensation carrier in actions against third parties are often the same.

CONFLICTING DECISIONS BY THE FIRST, SECOND, FOURTH, FIFTH AND NINTH CIRCUIT COURTS OF APPEAL

The First Circuit in Cella v. Partenreederei M/S Ravenna, supra, followed the Fund Rule adopted in Fontana, supra. In Cella, the plaintiff longshoreman recovered $199,560.72 from the shipowner. The compensation lien was $24,560.72. Plaintiff's attorney had a one-third contingency fee agreement with the longshoreman. The attorney attempted to deduct one-third of the lien for attorney's fees.

The Cella court, citing Fontana with approval at footnote 1, held that the lien could not be charged for attorney's fees because the longshoreman's share of the recovery was sufficient to pay the fees. The reasoning in Cella, supra, has been followed by the Second Circuit Court of Appeals: Valentino v. Rickners Rhederei, G.M.B.H., SS Etha, 552 F.2d 466 (2d Cir. 1977); Bloomer v. Tung, 586 F.2d 908 (2d Cir. 1978), cert. granted, 60 L. Ed. 2d 1043 (1979) (No. 1418, 1978 term).

The Fourth Circuit, on the other hand, in Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975), held that pro rata attorney's fees were to be assessed against the compensation lien even if the longshoreman's share of the recovery is sufficient to pay both the attorney's fees and the full amount of the lien. See also, Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977). It was the pro rata rule announced in Swift v. Bolten, supra, that was adopted by the Ninth Circuit in this case.

The Fifth Circuit Court of Appeals has adopted the rule that apparently attempts to reach a compromise between the Fund Rule and the Pro Rata Rule. Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978). The Fifth Circuit in Mitchell adopted what it termed a "quantum meruit approach" in the calculation of what attorney's fee would be charged the compensation lien. The court pointed out that under the quantum meruit approach there will be some cases where the lien will be assessed a fee, and some cases where the lien will be given a "free ride."

IMPORTANCE OF THE QUESTIONS

The question of whether the compensation lien should be automatically charged with pro rata attorney's fees is important because it means that the compensation lien in every third party action would be reduced by anywhere from 33 to 50 percent. This automatic reduction of the carrier's lien in every case brought by an employee under 33 U.S.C. § 933(e) would reduce the funds available for compensation of injured longshoremen under the Act. As the First Circuit stated in Cella, supra,

> . . . the overriding purpose of the 1972 amendments [to the LHWCA] was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act.

529 F.2d at 20.

If the Court decides to adopt the Pro Rata Rule, then it is important for the Court to decide whether a compensation carrier which has intervened early in the lawsuit to protect its lien can deduct the fees paid its own attorneys from the fees it arbitrarily must pay the plaintiff's attorneys out of the compensation lien. If not, the carrier must pay two sets of attorneys. This would discourage the carrier from hiring attorneys to intervene to protect the lien, and this will interfere with the carrier's ability to protect the funds available for payment of compensation under the Act. Furthermore, the carrier would be paying a greater percentage of its recovery for attorney's fees than would the longshoreman because in addition to the plaintiff's attorney's arbitrary one-third contingency fee, the carrier would be paying the attorneys it has hired to intervene.

RELATED CASES

A Petition for Certiorari is pending in the underlying and companion case, United States Court of Appeals for the Ninth Circuit, No. 77-3645, Mammoth Bulk Carriers, Ltd., Petitioner, v. James D. Bachtel, Donna Bachtel, and Twin Harbors Stevedoring Co., Respondents. In addition, the question of pro rata attorney's fees is being considered by this Court in the context of a settlement in Bloomer v. Liberty Mutual Insurance Co., Supreme Court No. 78-1418.

CONCLUSION

For the foregoing reasons, we submit that this court should grant a Writ of Certiorari to review the decision of the court of appeals.

DATED this ____ day of _____, 1979.

WILLIAMS, LANZA, KASTNER,
& GIBBS

Paul C. Gibbs &
Joel D. Cunningham
Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs, v. MAMMOTH BULK CARRIERS, LTD., Defendant TWIN HARBOR STEVEDORING CO., Intervenor.	)	NO. C75-455M ORDER DENYING MOTION FOR PRO-RATA ATTORNEY'S FEES AND COSTS

THIS MATTER comes on for consideration before the undersigned Judge of the above-entitled Court upon the motion of the plaintiffs for an order directing the intervenor to pay the plaintiffs' attorneys an attorney fee in an amount equal to 33 and 1/3 percent of the intervenor's compensation lien, and pro-rata costs in the third party action.

The Court having considered the records and files herein, including but not limited to the argument and authorities presented by the plaintiffs and the intervenor on the question before the Court, concludes that the motion for pro-rata attorney's fees and costs must be denied.

The plaintiff's reliance on Valentino v. Rickners Rhederei, G.M.B.H., etc., 552 F.2d 466 (2d Cir. 1977) is misplaced. There the employee's compensated medical expenses were three times what the jury awarded him against the shipowner. In the employer's compensation lien.

In so ruling, the Court carefully distinguished Fontana v. Pennsylvania R.R., 106 F. Supp. 461 (S.D.N.Y. 1952). There the employee recovered

$4,000.00 in court after he was paid compensation and medical expenses of approximately $1,700.00 by the employer. In Fontana, the attorney fee was not deducted from the employer's compensation lien. The Valentino Court bottomed its reading of Fontana on its conclusion that the Fontana holding "simply does not address the situation we have here, where the longshoreman does not share in the recovery and only the stevedore can pay."

The intervenor relies, inter alia, upon Cella v. Partenreederei MS Ravena, 529 F.2d 15 (Cir. 1, 1975), cert denied, 425 U.S. 975, 96 S.Ct. 2175, 48 L. Ed. 2d 799 (1976). The Cella rationale gives additional support to the Court's ruling in the case at bar. NOW, THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the motion of the plaintiff for an order directing the intervenor to pay the plaintiff's attorneys an attorney fee in an amount equal to 33 and 1/3 percent of the intervenor's compensation lien, and pro-rata costs in the third party action be and the same is hereby DENIED.

The Clerk is instructed to enter judgment in accordance with this order.

DATED this 27th day of July 1977.

s/
WALTER T. MCGOVERN
Chief United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellees, vs. MAMMOTH BULK CARRIERS, LTD., Defendant-Appellant. TWIN HARBOR STEVEDORING CO., Intervenor.	No. 77-3645
JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellants, vs. MAMMOTH BULK CARRIERS, LTD., Defendant-Appellee. TWIN HARBOR STEVEDORING CO., Intervenor.	No. 77-3043

[August 20, 1979]

Appeal from the United States District Court
Western District of Washington

OPINION

Before: KILKENNY and SNEED, Circuit Judges, and WATERS, District Judge.*

KILKENNY, Circuit Judge:

Mammoth Bulk Carriers [Mammoth] appeals from a judgment entered in an action prosecuted by appellee James D. Bachtel and his wife for personal injuries sustained by him when he fell to the dock from a logload on the deck of the M/S MAMMOTH FIR, a vessel owned by Mammoth. Bachtel was employed as a longshoreman by Twin Harbor Stevedoring Co., a stevedore engaged in loading logs on board the vessel. After a trial by jury, a judgment was entered in favor of the Bachtels. After verdict, the stevedore company intervened pursuant to 33 U.S.C. § 933 and asserted a lien against the recovery in the amount of the worker compensation benefits it had paid. The Bachtels moved for a pro-rata contribution of attorney fees from the intervenor. The district court denied the motion. The Bachtels appeal from this denial. The parties stipulated that the two appeals should be consolidated for all permissible purposes under FRAP 3 (b).

OUTLINE OF FACTS

The MAMMOTH FIR, a bulk log carrier in the Pacific trade, is similar to many other log carriers in design and construction. It has five hatches, all forward of the house. It was manned by a Korean crew. The accident occurred in Aberdeen, Washington, a major log exporting port. Ninety percent of the stevedoring work in that area is the loading of log ships. The MAMMOTH FIR was moored in a berth and at the time of the accident

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* The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

was fully loaded. The lashing of the deck cargo of logs was the only work remaining to be done by the stevedore.

The deck load of logs was contained within steel stanchions along both sides of the vessel. The stanchions rose 20 feet from the deck and the logs rose to within a foot or two from the top of the stanchions. The load was "trimmed" to reach a height approaching 30 feet at the centerline of the ship. The deck load was to be secured with wire [cable] ropes, assisted by heavy chains. Each wire rope and chain was shackled at the lower end to a pad eye on the deck. The ropes were laid over the top of the logs from both sides of the ship, about six feet apart, and tightened by "lacing" them together at the peak or top of the load. The chains were then lifted by a winch from both sides of the ship and strung to the peak of the load to be straightened and freed by longshoremen of any twists, each chain to be secured to its opposing chain by a turn buckle. The work of straightening the chain is commonly known as "pulling."

The accident occurred while Bachtel, in his employment as a longshoreman, was helping another longshoreman pull a chain atop the starboard side of the deck load at the number two hatch.[1] While Bachtel and his co-worker were taking the twists out of the chains, Bachtel fell some 30 feet to the dock below. There is some confusion as to the manner in which he actually fell, but there is no question that he was on the top starboard side of the deck load of logs when he started his fall and he was seriously injured.

PROCEDURAL BACKGROUND

Briefly stated, the Bachtels charged Mammoth with negligence in the following particulars:

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[1] See Appendix A.

(1) Failing to provide a means of erecting a safety line or safety net on the edge of the loaded deck when it knew or in the exercise of reasonable care should have known that longshoremen would be required to work at or near the edge of the deck load and thereby be exposed to a high risk of falling.

(2) Permitting the loading of logs on its deck above the level of the stanchions when it knew or in the exercise of reasonable care should have known that safety lines or safety nets would not be rigged to minimize the risk of longshoremen personnel falling to.the dock below.

(3) Directing the design of the logload on its deck at levels which created an unreasonable risk of harm to longshore personnel without providing the means for erecting safety lines or nets or other equipment to minimize such risk.

(4) Failing to require the stevedore to take precautions to prevent the risk of falling when Mammoth knew that the contracted work created a risk of harm by falling, this contention being based on the land based standard of care imposed on contractors under Restatement of Torts (Second).

(5) Violating OSHA's Safeth and Health Regulations for longshoring, 29 C.F.R. § 1918.32 (b).

At the close of the Bachtels' case, Mammoth moved for a directed verdict. This motion was denied and Mammoth went forward with its case. At the close of the evidence and before submission to the jury, Mammoth failed to again move for a directed verdict. It did, however, propose a jury instruction to direct a verdict in Mammoth's favor, which was refused by the district court. After instructions and arguments, the jury returned a verdict in favor of Bachtel for damages in the sum of $305,109.00 and in favor of his wife for a loss of consortium in the sum of $50,000.00. In arriving at its verdict, the jury found that Bachtel was guilty of negligence to the extent of 25% and

accordingly reduced the recoveries to $266,331.75. Mammoth then moved for a judgment notwithstanding the verdict pursuant to Rule 50(b), FRCivP. Mammoth's assignments of error are grounded upon the denial of this motion.

ISSUES

I. Did the court err in denying appellant's motion for judgment notwithstanding the verdict?

II. Was Mammoth guilty of "negligence" as that word is used in 33 U.S.C. § 905 (b)?

III. Was one of the court's instructions erroneous as a matter of law?

IV. Did the court err in denying the Bachtels' motion to allocate attorney fees between themselves and the stevedore?

APPLICABLE STATUTORY LAW

In reviewing the issues before us, we must look to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et seq. [the Act]. Bachtel brought his action under the 1972 amendments to the Act; in particular, 33 U.S.C. § 905 (b). These amendments radically changed the law in this field. By virtue of these amendments, the longshoreman is entitled to increased workers' compensation benefits, but these benefits now constitute his sole remedy against the stevedore. However, the longshoreman has a cause of action against the vessel owner on a negligence theory, the former "unseaworthiness" brand of strict liability being abolished by the Act. Additionally, the shipowner, if liable, has no cause of action for indemnity against the stevedore.

If, under the provisions of the Act, the injured longshoreman fails to bring an action against the shipowner within six months, the stevedore or its compensation carrier, has the right to do so on his behalf. If the stevedore

brings the action, the statute provides for the manner in which the recovery is to be distributed. 33 U.S.C. § 933 (e). The statute is silent as to distribution of proceeds when the longshoreman brings the suit, but it is clear that the stevedore has a lien against the longshoreman's recovery for the amount of benefits it has paid. The statute also does not define negligence. However, Congress clearly did not intend to use the word in its common law sense. We shall touch upon this subject later in the opinion.

I.

In the light of our conclusion that the evidence of Mammoth's negligence is substantial, if not overwhelming, we find no reason to examine in detail the merits of Mammoth's contention that the court erred in failing to grant its motion for judgment notwithstanding the verdict. As to the Bachtel's contention that the procedural provisions of FRCivP 50 (b)[2] preclude our consideration of this issue, no doubt the district court considered Mammoth's motion for a directed verdict at the close of the plaintiff's case and in addition its request for an instruction requiring the jury to return a verdict in Mammoth's favor. These procedural steps placed the issue of the sufficiency of

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[2] "(b) Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . ."

the evidence directly before the court. Consequently, the court had jurisdiction to pass on the sufficiency of the evidence under the Rule 50 (b) motion even though there was no motion for a directed verdict as required by the rule.

Although Guerrero v. American-Hawaiian Steamship Co., 222 F.2d 238, 244 (CA9 1935), uses strong language in support of a strict enforcement of Rule 50 (b), what is there said must be viewed in the light of the fact that a summary judgment was involved and the judge, rather than a jury, decided the case.

Our view, as above expressed, is supported by Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814, 817 (CA2 1970); Jack Cole Co. v. Hudson, 409 F.2d 188, 191 (CA5 1969) [requested instruction for a directed verdict is the equivalent of a motion for a directed verdict]; and 9 Wright & Miller 2539, P. 608. We decline to follow the demigogic approach expressed in DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (CA3 1978), or Martinez-Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (CA1 1978). Accordingly, we hold that the district court properly denied Mammoth's Rule 50 (b) motion on the ground that the evidence was sufficient to support the verdict.

II.

Before the 1972 amendments to the Act, the longshoremen could sue the shipowner for damages for personal injuries resulting from negligence or the unseaworthiness of the vessel. If the unseaworthiness resulted from a breach of the stevedore's implied warranty to perform its services in a safe and workmanlike manner, the shipowner would either implead the stevedore or, after judgment for the longshoreman, prosecute an action for indemnity against the stevedore. This triangular type of law suit resulted usually in the longshoreman receiving indirectly from the employer sums substantially more than the employer would have to pay the

longshoreman by way of benefits under the then existing compensation act. Inasmuch as this circuity of litigation did violence to the statutory scheme then existing, the Congress passed the 1972 amendments. The main purpose of those amendments was to trade a rather substantial increase in compensation benefits to the longshoreman for his right to recover damages from the shipowner for personal injuries resulting from the unseaworthiness of the vessel. The longshoreman, however, retained a right to bring an action against the shipowner [Mammoth] for injuries resulting from the latter's negligence.

Due to Congress' failure to define "negligence" as it used that word in 33 U.S.C. § 905 (b) (the amendment which permits the longshoreman to recover against the shipowner), the law on the subject in our circuit,[3] and in others, was in a state of flux until the recent decision in Santos v. Scindia Steam Navigation Co., Ltd., ___ F.2d. ___ (CA9 May 1, 1979) [Sl. Op. 1314]. Santos stated a standard of negligence to be applied in 33 U.S.C. § 905 (b) actions, as follows:

> "A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and

---

[3] See Davison v. Pacific Navigation Co., Inc., 569 F.2d 507 (CA9 1978); Wescott v. Impresas Armadoras S.A. Panama 564 F.2d 875 (CA9 1977); Shellman v. United States Lines, Inc. 528 F.2d 675 (CA9 1975), and numerous district court cases, including Gallardo v. Westfal-Larsen & Co., 435 F.Supp. 484 (D.Or. 1977).

> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger." [Sl. Op. at 1320.]

The standard of negligence applied in Santos conforms to the standard on the same subject announced in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-32 (1959). There, the Supreme Court refused to distinguish between licensees, trespassers and invitees and held that the one standard should be applied to all, that is "reasonable care under the circumstances of each case."

In the instructions to the jury, the district court defined negligence as follows:

> "Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances.
>
> "Ordinary care is the care a reasonably prudent person would exercise under the same or similar circumstances.
>
> "The term 'proximate cause' means a cause which in a direct sequence, unbroken by any new, independent cause, produces in whole or in part the injury complained of and without which that injury would not have happened. An injury may have more than one proximate cause."

Mammoth made no objection, nor took any exception, to this instruction on negligence as given by the court.

We now apply the standard of care outlined in Santos to the facts before us. In summary, the record shows that:

(1) Mammoth Fir was designed for no purpose other than a log carrier and that the steel stanchions provided by the vessel and used to secure the deck load were neither equipped with a device nor was there any procedure provided by which safety lines or nets could be attached to the stanchions.

(2) The failure to provide safety lines or nets to longshoremen lashing the log deck and working at the edge of the stack exposed longshoremen and, in particular, the appellee to a high risk of falling overboard and sustaining severe injuries.

(3) Mammoth had actual notice of the fact that the stevedore company could and would not rig safety lines or nets to protect longshoremen lashing the logs while working at the edge of the log deck and Mammoth knew that the stevedore would not provide such safety lines.

(4) Mammoth had actual knowledge of the fact that longshoremen were compelled to work near the edge of the logs in order to load and lash them and that walking or working near the edge of the logs created a high risk of slipping and falling off the edge the deck load.

(5) The lashing was done at the direction of Mammoth with participation by its crew using a method chosen by it and dictated by the vessel's design and equipment. Mammoth's design of the load of logs, in and of itself, created an extremely high risk of falling to persons, such as appellee, working at the top edge of the log deck while attempting to lash the logs.

The evidence before us and the inferences to be drawn therefrom fully support the above summarization. There is substantial evidence to support the jury's verdict that Mammoth was negligent under the Santos standard.

Consequently, we conclude that the district court properly denied appellant's motion for a directed verdict and we, likewise, conclude that it properly rejected the requested instruction for a verdict in appellant's favor as to negligence. The fact that the court's instruction does not fully conform to the standard oulined [sic] in Santos is of no consequence. Appellant did not complain of the instruction, but relied entirely on the insufficiency of the evidence to show negligence on its part. On this state of the record, the nonconformance, if any, of the instruction with the Santos standard is completely harmless. Nor does the conceded negligence of the stevedore bar an action against Mammoth. The appellee may recover the full amount of his judgment against Mammoth, even though the stevedore was also negligent. This was settled in the recent case of Edmonds v. Compagnie Generale Transatlantique, ___ U.S. ____ (June 27, 1979) [Sl. Op. 1 at 6-7].

III.

Finally, Mammoth alleges that the court erred in first reading to the jury Bachtel's contention that Mammoth failed to comply with the requirements of the Safety & Health Regulations for Longshoring, 29 C.F.R. §§ 1918.2 and 1918.32, and then instructing the jury that it could consider the regulations with other evidence. The latter section of the Code provides:

* * * * * *

> "(b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that is presents a danger of an employee falling, the edge shall be guarded by a safety net or (sic) adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

* * * * * *

Prior to the 1972 amendments to the Act, it was well settled that a violation of the then existing regulations was a subject which was properly presented to the jury. Provenza v. American Export Lines, Inc., 324 F.2d 660 (CA4 1963). Although the Provenze court was principally concerned with the doctrine of unseaworthiness, it also spoke to the issue of negligence. We quote:

> "It follows, of course, that if the jury should find that the stevedore had violated the regulations such conduct could also constitute negligence. If in turn the negligent conduct of the stevedore were known, or by the exercise of reasonable care should have been known to the shipowner, and such negligence of the shipowner was a proximate cause of the plaintiff's injury, then he too would be liable to the plaintiff on the additional grounds of negligence." Id. at 665. [Emphasis supplied.]

In Boleski v. American Export Lines, Inc., 385 F.2d 69 (CA4 1967), the Fourth Circuit approved the doctrine announced in Provenza, stating that the judge may properly instruct the jury that a violation of the safety and health regulations may be considered as evidence of negligence. The court held:

> "The Supreme Court denied certiorari in Provenza and this court has had no occasion to review it. It has been followed by the Second Circuit in Reid v. Quebec Paper Sales & Transportation Co., Ltd. 340 F.2d 34 (1965), and the Fifth Circuit in Marshall v. Isthmian Lines, Inc., 334 F.2d 131 (1964). Defendant has advanced no argument which disturbs or undermines the well-reasoned foundation of Provenza and we are not disposed to depart from its holding. We find no error in the court's charge respecting the regulation." Id. at 74. [Emphasis supplied.]

The Fourth Circuit followed the same rule in Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347, 353 (CA4 1968).

However, since the enactment of the 1972 amendments eliminating the doctrine of unseaworthiness and restricting a longshoreman's recovery against the shipowner to negligence, the majority of the courts that have considered the regulations have limited their application to stevedores and held that they do not impose a duty on the shipowner. In the main, these cases arrive at their respective conclusions by holding that the provisions of 29 C.F.R. § 1918.2 expressly eliminate the shipowner from duties or obligations created by any one or more of the regulations. This section reads:

> "(a) The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in § 1918.3(c).
>
> "(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom." [Emphasis supplied.]

Another proffered ground for the decisions of non-applicability of the regulations in the post-1972 period is that the cases such as Provenza, decided prior to the amendments, involved unseaworthiness, rather than negligence.

A casual reading of these authorities demonstrate that negligence was involved and emphasized in each one of the pre-1972 authorities. The post-1972 authorities speaking to this question entirely overlook the language of the mentioned

section of the regulation which provides, in substance, that it does not relieve owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation, or custom. In fact, § 1918.2 has remained unaltered since the regulations were originally promulgated in 1960, pursuant to 33 U.S.C. § 941. The same is true of § 1918.32(b) which was the basis for the district court's instruction in this case. Consequently, the specific language of § 1918.2, and the cases interpreting that section continue to bind the owner.

The post amendment cases are cited and briefly analyzed in Chavis v. Finnlines. Ltd. O/Y, 576 F.2d 1072, 1082 (CA4 1978). The Chavis court erroneously emphasized that Provenza dealt only with an unseaworthy condition when, in fact, the decision was also concerned with negligence. Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233 (CA5 1977), and Brown v. Ivarans Rederi A/S, 545 F.2d 854 (CA3 1976), cited in support of the conclusion that the regulation cannot be utilized by a longshoreman against the shipowner, rely on the same basic error and on the unwarranted interpretation of 29 C.F.R. § 1918.2.

Although § 1918.2 makes it clear that the regulations do not place additional responsibilities or duties on owners, operators, and others, it likewise makes it crystal clear that the regulations do not relieve the owners, operators, or masters from responsibilities or duties then placed upon them by law, regulations, or custom. The designing of a 20-30 foot deck load of logs without adequate safeguards at the sides could well have been viewed as evidence of negligence under the law as it existed prior to 1972. This design along with the failure to provide protective nets or other devices would be presented to a jury under the customary definition of negligence. That is to say, the regulations here required nothing more

than the due care required under the doctrine of negligence as it existed in maritime law prior to 1972.

We must assume that Congress was aware of the Provenza, Bolenski and Venable decisions, which held that the regulations applied to negligence on the part of the shipowner, at the time it passed the 1972 amendments. The negligence mentioned in 33 U.S.C. § 905(b), therefore, would necessarily include a violation of the then existing law and regulations, including § 1918.32 (b), the subject of the court's instruction challenged by appellant. See Shapiro v. United States, 335 U.S. 1 (1948); Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954).

Although neither the 1972 amendments, nor the regulations here mentioned, were involved in Reyes v. Vantage S.S. Co., Inc., 558 F.2d 238 (CA5 1977), we suggest that the rule stated there is a proper one to be utilized in deciding whether the regulations under scrutiny should be here applied. In Reyes, the court held that where a statute was intended to protect the class of people to which a plaintiff belongs against risk of the type of harm which has in fact occurred, violation of such statute is negligence in itself. The court went on to say that inherent in the statement of the legal principle were three questions which should be resolved before liability could be imposed on a negligence theory: (1) was there a violation of the regulations; (2) were the regulations designed to protect the plaintiff; and (3) were they intended to protect against the risk of the kind of harm that occured? Id. at 242. Here, the evidence supplies all three elements beyond question.

In general, the regulations, which were promulgated under 33 U.S.C. § 941, were intended to eliminate the risk of injury to all longshoremen and not just to those who exercise prudence. Denny v. Jugoslavenska Oceanska Plov, 455 F.2d 1277, 1278 (CA5 1972). The regulations might prove helpful in suggesting types of measures deemed

necessary for maintenance of a safe ship. Darwin v. United States, 435 F. Supp. 501, 507 (ND Cal. 1977), and are binding on the shipowner where he knew or should have known of a violation of the safety regulations. Anuszewski v. Dynamic Mariners Corp. Panama, 391 F. Supp. 1143, 1145 (D. Md. 1975), aff'd. 540 F.2d 757 (CA4 1976).

Here, the trial judge did not instruct that Mammoth was negligent as a matter of law in failing to comply with the regulation. He submitted the regulation to the jury, along with all other evidence, so that the members might determine whether Mammoth was guilty of negligence. This would be the proper course to follow under all of the pre-1972 cases on the subject. We observe no real distinction between the requirements of a statute as mentioned in Reyes, and the requirements of the regulation presented to the jury by the district court. The court properly presented the regulation for the jury's consideration.

IV.

As previously mentioned, the stevedore intervened in these proceedings to assert its lien on the Bachtels' recovery for the amount of compensation it had paid pursuant to 33 U.S.C. § 933. Its claim of lien approximates $33,000.00. The Bachtels recognized the validity of the lien, but claimed that the efforts of their attorney were responsible for recovering the fund on which the lien was claimed and, consequently, the stevedore should contribute its proportionate share of the attorney fees and costs.

The district court rejected the Bachtels' claim and adopted what is commonly known as the "Fund" rule under which the attorney fees come off the top of the recovery, then the lien is paid in full and the injured party receives the residue. This theory received support in Cella v. Partenreederei MS Ravenna, 529 F.2d 15 (CA1 1975); cert. denied 425 U.S. 975 (1976). The "Fund" rule was

first announced in Fontana v. Pennsylvania R. Co., 106 F. Supp. 461 (SD NY 1952), aff'd. mem. sub nom Fontana v. Graceline, Inc., 205 F.2d 151 (CA2 1953), cert. denied 346 U.S. 886. This approach was enforced in Valentino v. Rickners Rhederei G.M.B.H., etc., 552 F.2d 466 (CA2 1977), in which the Second Circuit reversed the district judge's adoption of a "pro-rata" approach in his opinion, 417 F. Supp. 176 (ED NY 1976). This type of distribution appears to follow the scheme which is set up in the statute with reference to recoveries obtained by the stevedore under 33 U.S.C. § 933 (e).

The "Fund" approach, in our view, places an unconscionable burden upon the injured person. For example, there are probably many cases where the recovery might exceed the stevedore's lien by a minimal amount. In such case, the stevedore would get the full benefit of the services of plaintiff's attorneys, yet contribute nothing, time or money, to the recovery.

The equitable approach, in our view, is that adopted in Swift v. Bolten, 517 F.2d 368 (CA4 1975). There, the district court held that the stevedore's lien took priority over the attorney fees. The Fourth Circuit, in reversing, adopted the "pro-rata" approach. Relying on settled equitable principles stated in Vaughan v. Atkinson, 369 U.S. 527 (1962), rehearing denied 370 U.S. 965; Sheris v. Travelers Ins. Co., 491 F.2d 603 (CA4 1974), cert. denied 419 U.S. 831, and on the fact that the conflicts of interest between the longshoreman and the stevedore were eliminated by the amendments of 1972, the court held that where the stevedore's pecuniary advantage was secured through the services of counsel employed by the longshoreman, the stevedore should be taxed with a proportionate share of the reasonable fee of the longshoreman's counsel.

In rejecting the fund approach stated in Valentino, the Fifth Circuit in Mitchell v. Scheepvaart Maatschappiz TransOcean, 579 F.2d 1274 (CA5 1978), said: " . . . This measured, arithmetic ranking cannot be defended on equitable principles unless we view the longshoreman as the only party who is, for some reason, not entitled to the Chancellor's consideration." Id. at 1279. In rejecting the "Fund" or statutory approach, the Mitchell court noted that not only is the statute silent on the subject, but that the equitable lien itself is a judicial creation. See Allen v. Texaco, Inc., 510 F.2d 977, 979-980 (CA5 1975). Additionally, the Mitchell court declined to follow the Cella court's determination and stated that the purpose of the 1972 amendments was to increase the amount of money available for compensation purposes. Mitchell also held that the ends of justice were better served by encouraging third party suits by the longshoremen. In criticism of Cella, Mitchell stated that its holding would discourage suits by longshoremen because they would be unwilling to sue unless they could be rather certain of recovering an amount substantially in excess of the lien. After further analysis, Mitchell went on to recognize that while the pro-rata approach stated in Swift might be appropriate in many cases, it would not adopt it as a hard and fast rule. It suggested in some cases the recovery might be large enough so that the entire attorney fee should be paid by the injured person. The Mitchell court concluded by suggesting a "balancing" approach which would consider the reasonableness of the fees, the services rendered, and the equities involved.

The Ninth Circuit has not spoken upon the problem. Upon reflection we forecast nothing but trouble and confusion in attempting to apply the Mitchell "balancing" formula. The guidelines are so vague that an appeal could be expected in a substantial number of the cases. The "Fund" approach stated in Cella, Fontana, and Valentino is unfair and in many instances would work a devastating hardship on the injured person. The Swift

"pro-rata" formula is easy to apply and is completely in line with equitable principles as well as Congress' intent in adopting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. On this record, we adopt the Swift "pro-rata" rule as the law to be applied in the Ninth Circuit. This disposition is in line with Judge Solomon's able opinion in Brown v. American Mail Line, Ltd., 437 F. Supp. 628 (D.Or. 1977).

We leave to another day a decision on the proper rule to be applied where the longshoreman recovers a judgment no greater than the lien of the stevedore-employer.

CONCLUSION

The judgment is affirmed except as to the application of the award of attorney fees. With reference to the attorney fees, the cause is remanded to the district court for application of the "pro-rata" formula adopted in Swift v. Bolten, supra.

AFFIRMED AS MODIFIED.

APPENDIX B

(photograph omitted)

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellees, vs. MAMMOTH BULK CARRIERS, LTD., Defendant-Appellant. TWIN HARBOR STEVEDORING CO., Intervenor.	)	No. 77-3645
JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellants, vs. MAMMOTH BULK CARRIERS, LTD., Defendant-Appellee. TWIN HARBOR STEVEDORING CO., Intervenor.	)	No. 77-3043 ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING

Appeal from the United States District Court
Western District of Washington

Before: KILKENNY and SNEED, Circuit Judges, and WATERS, District Judge.*

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* The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation.

The opinion heretofore filed in this cause is amended as follows:

(1) Strike the word "After" and substitute the word "Before" as the first word opening the sentence commencing on the next to the last line of the opening paragraph of the opinion on page 3074 of the slipsheet.

Otherwise, the intervenor's petition for a rehearing is denied.

APPENDIX D

LEGISLATIVE HISTORY, 33 USCA § 933.

Historical Note

1972 Amendment. Subsec. (b). Pub.L. 92-576, § 15(f), inserted "or Board" following "deputy commissioner".

Subsec. (e)(1)(A). Pub.L. 92-576, § 15(g), inserted "or Board" following "deputy commissioner".

Subsec. (g). Pub.L. 92-576, § 15(h), substituted "if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made" for "if such compromise is made with his written approval".

1959 Amendment. Subsec. (a). Pub.L. 86-171 inserted "or a person or persons in his employ" following "employer" and substituted "he need not elect whether" for "he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide,".

Subsec. (b). Pub.L. 86-171 added "unless such person shall commence an action against such third person within six months after such award".

Subsec. (c). Pub.L. 86-171 deleted ", whether or not the representative has notified the deputy commissioner of his election" following "third person".

Subsec. (d). Pub.L. 86-171 reenacted subsec. (d) without change.

Subsec. (e). Pub.L. 86-171 substituted "Secretary" for "Commission" in par. (1)(D) and

added in par. (2) "less one-fifth of such excess which shall belong to the employer".

Subsec. (f). Pub.L. 86-171 deleted "or the representative elects to recover damages against such third person and notifies the Secretary of his election and" preceding "institutes" and substituted "subdivision (b) of this section" for "section 913 of this title" and "Secretary" for "Commission".

Subsec. (g). Pub.L. 86-171 corrected reference to "subdivision (e)" to read "subdivision (f)".

Subsec. (h). Pub.L. 86-171 redesignated former subsec. (i) as (h), and eliminated former subsec. (h), which permitted the deputy commissioner to make an election for a minor or to authorize the parent or guardian to make the election.

Subsec. (i). Pub.L. 86-171 added subsec. (i) and redesignated former subsec. (i) as (h).

1938 Amendment. Subsec. (b). Act June 25, 1938, § 12, inserted "under an award in a compensation order filed by the deputy commissioner" and deleted at the end of the sentence "whether or not the person entitled to compensation has notified the deputy commissioner of his election".

Subsec. (e). Act June 25, 1938, § 12, redesignated par. (1)(C) as par. (1)(C) and (D) and included in said para. (1)(D) the present value of the cost of benefits furnished.

Subsec. (i). Act June 25, 1938, § 13, added subsec. (i).

Effective Date of 1972 Amendment. Amendment by Pub.L. 92-576 effective 30 days after Oct. 27, 1972, see section 22 of Pub.L. 92-576, set out as an Effective Date of 1972 Amendment note under section 902 of this title.

Repeals. Reorg. Plan No. 19 of 1950, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271, which was formerly set out in the credit to this section and which transferred the functions of the Federal Security Administrator to the Secretary of Labor, was repealed by Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662.

Reorg. Plan No. 2 of 1946, § 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095, which was formerly set out in the credit to this section and which transferred the functions of the United States Employees' Compensation Commission to the Federal Security Administrator, was repealed by Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662.

Legislative History. For legislative history and purpose of Pub.L. 86-171, see 1959 U.S.Code Cong. and Adm.News, p. 2134. See, also, Pub.L. 92-576, 1972 U.S.Code Cong. and Adm.News, p. 4698.

NO. 79-850

FEB 15 1980

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TWIN HARBORS STEVEDORING CO.,

Petitioner,

v.

JAMES D. BACHTEL, DONNA BACHTEL AND MAMMOTH BULK CARRIERS, LTD.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEVINSON, FRIEDMAN, VHUGEN, DUGGAN, BLAND & HOROWITZ

ROBERT D. DUGGAN
Attorney for Respondents

Office & Post Office Address:
1600 Seattle Tower
Seattle, WA 98101

ABCD AT CRAFTSMAN PRESS, SEATTLE

IN THE
SUPREME COURT OF THE UNITED STATES

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TWIN HARBORS STEVEDORING CO.,

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v.

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MAMMOTH BULK CARRIERS, LTD.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents-plaintiffs join in the Petition for Writ of Certiorari to review the Ninth Circuit decision relating to pro rata attorneys' fees under the Longshoremen's and Harbor Workers' Compensation Act and respectfully request that this court's decision in Bloomer v. Tung, 586 F.2d 908 (2d Cir. 1978), certiorari granted, No. 78-1418, argued Dec.

4, 1979, be withheld pending briefing and arguing of this case so that the two cases may be considered together.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 605 F.2d 438. The portion of the decision for which certiorari is sought appears at 605 F.2d 446-47.

QUESTION PRESENTED

From the proceeds of a judgment in a longshoreman's negligence action against the shipowner, is the longshoreman's employer entitled to 100% reimbursement of compensation paid, or should the reimbursement be subject to *pro rata* attorneys' fees and costs?

COUNTERSTATEMENT OF THE CASE

The background of the case is set forth in the Ninth Circuit's decision at 605 F.2d 438 (1979) at 446.

Stated briefly, at the time that the respondents-plaintiffs obtained a judgment against the defendant, petitioner-intervenor had paid respondents approximately $33,000.00 in compensation and medical benefits under the Longshoremen's and Harbor Workers' Compensation Act. The district court denied respondents' motion for pro rata attorneys' fees and the Ninth Circuit reversed, adopted a pro rata rule, following Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975), and rejected the fund approach because "it places an unconscionable burden upon the injured person", 605 F.2d at 446. Under the fund approach, the plaintiff's lawyer gets paid in full, the plaintiff's employer gets reimbursed in full and plaintiff gets what is left. Under the pro rata rule adopted by the Ninth Circuit, the costs and fees incurred in obtaining the judgment are borne in proportion to the benefit received. Contrary to the assertions of petitioner, the pro rata rule does not force the compensation carrier to pay a pro rata attorney's fee

determined by "whatever contingency fee agreement has been entered into between plaintiff and his attorney". The district courts, under general equity powers, have jurisdiction to review the reasonableness of the fee assessed. Here the parties agreed that the fee was usual and customary. There was no objection as to reasonableness. Where there is such an objection, petitioner can litigate that issue before the district judge.

Although petitioner was permitted to intervene by stipulation early in the proceedings, petitioner-intervenor did not participate in the litigation. It was recognized that petitioner-intervenor's interest arose only after respondents-plaintiffs obtained a judgment against the defendant. Any attorneys' fees incurred by petitioner were not related to the negligence action but rather "in protecting its lien", i.e., its claim for full subrogation without deduction for attorneys' fees.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted and this case considered with Bloomer v. Tung, No. 78-1418, which raises the issue in the context of settlement. There is a direct conflict in the circuits between the fund approach (First and Second), the pro rata approach (Fourth and Ninth), and an equitable approach adopted by the Fifth Circuit.

IMPORTANCE OF THE QUESTION

There is no question of the conflict in the circuits between the pro rata rule; Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975); Bachtel v. Mammoth Bulk Carriers, 605 F.2d 438 (9th Cir. 1979); the fund rule; Cella v. Partenreederei M/S RAVENNA, 529 F.2d 15 (1st Cir. 1975), cert. denied, 425 U.S. 975 (1976) and Bloomer v. Tung, 586 F.2d 908 (2d Cir. 1978), cert. granted, No. 78-1418, (Oct. 1978 Term); and the equitable approach Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978).

The basic question to be decided is whether the employer or its compensation carrier will be given a "free ride" in third party litigation at the expense of the injured plaintiff or his lawyer. Under the fund rule, the injured plaintiff always nets less from a third party recovery. Under the pro rata rule, the plaintiff almost always nets more, the exception being in those cases where the judgment is less than or barely exceeds the compensation paid. The Ninth Circuit specifically reserved decision in that situation. The amount a plaintiff nets is a primary question in the settlement of any third party case. A rule which ensures that the employer-carrier will pay pro rata costs and attorney's fees whether the case is tried or settled will encourage settlements. Whereas, under the "fund rule" the plaintiff is encouraged to try his case in the hope of obtaining a verdict large enough to pay his lawyer a fee based on the gross verdict, then his employer 100% subrogation, then the costs of suit.

Petitioner's footnote suggestion that the attorney's fee be based on the net recovery to the plaintiff (verdict-subrogation) begs the issue, since in that case it would be plaintiff's lawyer who would be subsidizing the employer, rather than the plaintiff. The issue presented here, and in a different context in Bloomer v. Tung No. 78-1418, argued Dec. 4, 1979, directly affects the trial and settlement of all third party actions under the Longshoremen's and Harbor Workers' Compensation Act. We respectfully suggest that the decision in Bloomer v. Tung be held in abeyance pending the briefing and arguing of this case.

Respectfully submitted,

LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN, BLAND & HOROWITZ

By ROBERT D. DUGGAN

Attorney for Respondents
Bachtel